CALIFORNIA OFFICE OF ADMINISTRATIVE LAW

SACRAMENTO, CALIFORNIA

In re: Request for Regulatory Determination filed by Robert R. Smith, concerning the Board of Prison Terms' Administrative Directive No. 87/4 (regarding a life prisoner's eligibility for work time credits in establishing minimum parole eligibility)[1]	1988 OAL Determination No. 1 [Docket No. 87-007] February 16, 1988 Determination Pursuant to Government Code Section 11347.5; Title 1, California Code of Regulations Chapter 1, Article 2

Determination by:

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SYNOPSIS

The issue presented to the Office of Administrative Law was whether the Board of Prison Terms' Administrative Directive No. 87/4 is a "regulation" required to be adopted in compliance with the Administrative Procedure Act.

The Office of Administrative Law has concluded that the Board of Prison Terms' Administrative Directive No. 87/4, which declines to apply the worktime credit provisions of the Penal Code to certain life prisoners, is a "regulation" required to be adopted in compliance with the Administrative Procedure Act.

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THE ISSUE PRESENTED [2]

The Office of Administrative Law ("OAL") has been requested to determine whether the Board of Prison Terms' ("Board") Administrative Directive No. 87/4 ("Directive") is a "regulation" as defined in Government Code section 11342, subdivision (b), and is therefore invalid and unenforceable[3] unless adopted as a regulation and filed with the Secretary of State in accordance with the Administrative Procedure Act ("APA").

THE DECISION [4,5,6,7]

The Office of Administrative Law finds that the Board's Administrative Directive No. 87/4, which declares that prisoners serving 15 years or 25 years to life, and life with possibility of parole are not eligible for worktime credits under section 2933, (1) is subject to the requirements of the APA, (2) is a "regulation" as defined in the APA, and (3) is therefore invalid and unenforceable unless adopted as a regulation and filed with the Secretary of State in accordance with the APA.[8]

I. AGENCY, AUTHORITY, APPLICABILITY OF APA; BACKGROUND

Agency

On July 1, 1977, the Community Release Board succeeded the Adult Authority and the California Women's Board of Terms and Paroles, which were abolished.[9] On January 1, 1980, the Community Release Board was renamed the "Board of Prison Terms."[10] The Board of Prison Terms meets periodically concerning parole matters at each prison.[11]

Authority [12]

Penal Code sections 5076.1 and 5077 provide that the Board shall hear parole applications and shall determine parole length, conditions, and whether revocation is appropriate.

Penal Code section 5076.2, subdivision (a), provides in part that:

> "Any rules and regulations, including any resolutions and policy statements, promulgated by the Board of Prison Terms, shall be promulgated and filed pursuant to [the APA] . . . ." [Emphasis added.]

Applicability of the APA to Agency's Quasi-Legislative Enactments

The APA applies to all state agencies, except those "in the judicial or legislative departments."[13] Since the Board is in neither the judicial nor the legislative branch of state government, we conclude that APA rulemaking requirements generally apply to the Board.[14]

In any event, subdivision (a) of Penal Code section 5076.2, cited above, specifies that the Board's rulemaking is subject to the APA.

Background

The following undisputed facts and circumstances have given rise to the present determination.

On July 1, 1977, California's determinate sentencing law, Penal Code section 1170, went into effect. Basically, this new sentencing statute prescribed three specific time periods from which the court must choose in sentencing a person convicted of a particular crime to a state prison. The objective of the determinate sentencing law was to eliminate disparity and provide for uniformity of sentences throughout the state.[15]

If a person is sentenced to state prison, but not pursuant to Penal Code section 1170, he or she is then considered to be

sentenced under Penal Code section 1168, subdivision (b). Section 1168, subdivision (b) provides for sentencing to state prison without a fixed term or duration of the period of imprisonment. This is called "indeterminate sentencing."[16] For purposes of this determination we are concerned with only three indeterminate sentences--(1) confinement in a state prison for a term of 25 years to life (e.g., for first degree murder)[17], (2) confinement in a state prison for a term of 15 years to life (e.g., for second degree murder), and (3) life with possibility of parole (e.g., for kidnapping where victim suffers no death or bodily harm).

Penal Code section 190 was repealed and reenacted in November 1978 by the people of California in an initiative measure (Proposition 7). Section 190 provides:

> "Every person guilty of murder in the first degree shall suffer death, confinement in state prison for life without possibility of parole, or confinement in the state prison for a term of 25 years to life. The penalty to be applied shall be determined as provided in Sections 190.1, 190.2, 190.3, 190.4, and 190.5.
>
> "Every person guilty of murder in the second degree shall suffer confinement in the state prison for a term of 15 years to life.
>
> "The provisions of Article 2.5 (commencing with Section 2930) of Chapter 7 of Title 1 of Part 3 of the Penal Code shall apply to reduce any minimum term of 25 or 15 years in a state prison imposed pursuant to this section, but such person shall not otherwise be released on parole prior to such time."[18] [Emphasis added.]

One of the purposes of section 190 was to increase the penalties for first and second degree murder.[19] Section 190 makes reference to the "provisions of Article 2.5 (commencing with Section 2930) . . . [which] shall apply to reduce any minimum term of 25 or 15 years in a state prison pursuant to this section." (Emphasis added.) At the time section 190 went into effect, Article 2.5 consisted of only three sections--2930, 2931, and 2932.

The Legislature added two additional sections--2933 and 2934 --to Article 2.5, effective January 1, 1983. Section 2933, subdivision (a) provides in part:

> "It is the intent of the Legislature that persons convicted of a crime and sentenced to state prison, under Section 1170, serve the

> entire sentence imposed by the court, except for a reduction in the time served in the custody of the Director of Corrections for performance in work, training or education programs established by the Director of Corrections. . . . For every six months of full-time performance in a credit qualifying program, . . . a prisoner shall be awarded worktime credit reductions from his term of confinement of six months. A lesser amount of credit based on this ratio shall be awarded for any lesser period of continuous performance. . . ."

Section 2934 provides in part that:

> "Under rules prescribed by the Director of Corrections, a prisoner subject to the provisions of Section 2931[20] may waive the right to receive [one-third good behavior] time credits as provided in Section 2931 and be subject to the [one-half worktime credit] provisions of Section 2933." [Emphasis added.]

The Requester, a prisoner serving an indeterminate sentence for an offense committed prior to January 1, 1983, signed an irrevocable waiver[21] on December 22, 1982. This waiver was accepted by the Department of Corrections ("Department") to be effective January 1, 1983. The waiver states:

> "I hereby waive my rights to the provisions of Section 2931 of the Penal Code. By making the voluntary waiver, I request that future Time Credit be granted pursuant to Section 2933 of the Penal Code."[22] [Emphasis added.]

Title 15, California Code of Regulations ("CCR")[23], sections 3043 and 3043.1 were adopted by the Department to interpret and implement Penal Code sections 2933 and 2934.[24] Section 3043, subdivision (c)(1), located in Article 3.5 entitled "Credits," provides:

> "(c) Worktime
>
> (1) An inmate serving a determinate term of imprisonment or an indeterminate term of 15 years to life or 25 years to life, for a crime committed on or after January 1, 1983, or who has waived their [sic] right to behavior and participation credits as provided in Penal Code Section 2934, may earn a reduction in their term of imprisonment or minimum eligible parole date, from the date of reception by the department or effective date of

> the waiver. Such credit reduction may be earned for participation in work, educational or vocational training assignments." [Emphasis added.]

On or about May 27, 1984, the Requester was notified by the Department that his "term [had] been calculated per 2933 P.C. /2934 P.C." and that his Minimum Eligible Parole Date ("MEPD") was July 17, 1989.

A few years later, the Board issued Administrative Directive No. 87/4 (the "challenged rule"), dated April 1, 1987, which stated in part:

> "The Attorney General concluded that state prisoners serving sentences of 25 years to life, 15 years to life, or life with possibility of parole are not eligible for worktime credits under Penal Code section 2933[25]. . . .
>
> "To comply with this opinion, the [Board] will cancel all initial life parole consideration hearings previously scheduled for prisoners who are serving 25 years to life and 15 years to life sentences and will rescind decisions rendered in hearings conducted prior to issuance of the Attorney General's opinion. Henceforth, prisoners serving 25 years to life and 15 years to life sentences will not be scheduled for initial life parole consideration hearings based on reduction of their minimum eligible parole dates by earning worktime credits pursuant to Penal Code Section 2933. These life prisoners may still have their minimum eligible parole dates reduced by one-third by earning good behavior and participation credits pursuant to Penal Code sections 2930 and 2931." [Emphasis added.]

On May 1, 1987, Robert R. Smith ("Requester") filed a Request for Determination with the Office of Administrative Law concerning Administrative Directive No. 87/4. The Requester contends that the Board's Directive interprets and implements Penal Code section 2933.

As a result of the Board's implementation of the Directive[26], at least twelve habeas corpus petitions were filed by affected life prisoners in two superior courts.[27] In its Response to the Request for Determination, the Board stated that "All of the [habeas corpus] petitions alleged that the petitioners as [sic] murderers sentenced to prison for 15 or 25

years to life under Penal Code section 190, are entitled to work incentive credits under Penal Code section 2933, contrary to the conclusion of the Attorney General."[28] In both superior courts, relief was denied to the petitioners.

On December 14, 1987, OAL received the Board's Response to the Request.[29]

II. DISPOSITIVE ISSUES

There are two main issues before us:[30]

(1) WHETHER THE CHALLENGED RULE IS A "REGULATION" WITHIN THE MEANING OF THE KEY PROVISION OF GOVERNMENT CODE SECTION 11342.

(2) WHETHER THE CHALLENGED RULE FALLS WITHIN ANY ESTABLISHED EXCEPTION TO APA REQUIREMENTS.

FIRST, WE INQUIRE WHETHER THE CHALLENGED RULE IS A "REGULATION" WITHIN THE MEANING OF THE KEY PROVISION OF GOVERNMENT CODE SECTION 11342.

In pertinent part, Government Code section 11342, subdivision (b) defines "regulation" as:

> ". . . every rule, regulation, order or standard of general application or the amendment, supplement or revision of any such rule, regulation, order, or standard adopted by any state agency to implement, interpret, or make specific the law enforced or administered by it, or to govern its procedure . . . ." [Emphasis added.]

Government Code section 11347.5, authorizing OAL to determine whether or not agency rules are "regulations," provides in part:

> "No state agency shall issue, utilize, enforce or attempt to enforce any guideline, criterion, bulletin, manual, instruction [or] . . . standard of general application . . . which is a regulation as defined in subdivision (b) of section 11342, unless the guideline, criterion, bulletin, manual, instruction [or] . . . standard of general application . . . has been adopted as a regulation and filed with the Secretary

> of State pursuant to [the APA]. . . ."
> [Emphasis added.]

Applying the definition of "regulation" found in Government Code section 11342, subdivision (b) involves a two-part inquiry:

> First, is the informal rule either
>
> - a rule or standard of general application or
> - a modification or supplement to such a rule?
>
> Second, does the informal rule either
>
> - implement, interpret, or make specific the law enforced or administered by the agency or
> - govern the agency's procedure?

With respect to Administrative Directive No. 87/4, the answer to both parts of this inquiry is "yes."

For an agency rule or standard to be "of general application" within the meaning of the APA, it need not apply to all citizens of the state. It is sufficient if the rule applies to all members of a class, kind or order.[31] It has been judicially held that "rules significantly affecting the male prison population" are of "general application."[32] Administrative Directive No. 87/4 is just such a rule. Its provisions are intended to apply to all members of a class, i.e., all prisoners serving 25 years or 15 years to life or life with possibility of parole for an offense committed on or after November 7, 1978.[33]

The Board stated in the Directive that it "will rescind decisions rendered in hearings conducted prior to issuance of the Attorney General's opinion." According to the Board's records, "for murder offenses which occurred on or after November 7, 1978 . . . four of these life prisoners were granted future parole dates . . . ; and their previously granted parole dates will be rescinded."[34] The Board argues that since there were only four prisoners who had their parole dates rescinded that the Directive, in this regard, "was specific action as to four prisoners [and therefore] was not an order of general application."[35] The Board cites Roth v. Department of Veterans Affairs[36], citing another court of appeals decision, as holding:

> "'The word 'general' means pertaining to all the members of a class, kind, or order.'"

The Board concludes that "The language relating to prisoners who have had hearings [where a future parole date had been set] would not fall within the definition [of 'general']."

We cannot agree with the Board on this point. The Board applied the decision to "rescind decisions rendered in hearings conducted prior to issuance of the Attorney General's opinion" throughout the state. Only after implementing this rule was it discovered that only four prisoners' parole dates would actually be rescinded. This is only the result of the statewide application of the Directive. It does not matter whether four, or 54[37], or 1054 prisoners had their parole dates rescinded. This particular portion of the Directive, as well as the entire Directive, applied to all parole consideration hearings throughout the state that had been conducted for life prisoners who were committed to state prison for murder offenses which occurred on or after November 7, 1978.

Administrative Directive No. 87/4 also meets the second test of a "regulation." The Directive interprets Penal Code section 2933 by concluding that prisoners sentenced to 15 years or 25 years to life, or to life with possibility of parole, are not eligible to receive worktime credits pursuant to section 2933.[38]

In its Response, the Board makes three arguments as to why the Directive does not meet this second prong of the definition of "regulation."

First, the Board claims that since it has no authority to, and it did not intend to, modify Title 15, CCR, section 3043, nor did it have the 'power to issue a regulation on the subject, its transmittal of the AG opinion [in the Directive] is not an underground regulation nor any kind of act requiring regulatory action."[39]

The Board correctly points out that the Department of Corrections, and not the Board, has the rulemaking authority for issuing regulations concerning the eligibility for work time credits. In fact, the Department of Corrections' has two regulations interpreting and implementing Penal Code sections 2933 and 2934, i.e., Title 15, CCR, sections 3043 and 3043.1 (quoted supra and in note 21, respectively), wherein Penal Code section 2933 is cited as a "reference"[40] citation for section 3043 and Penal Code section 2934 is cited as a "reference" citation for section 3043.1.

Hence, if it is determined that policies concerning eligibility for work time credits need to be modified,

that modification must be done by the Department by adopting or amending regulations.

It is irrelevant, however, whether the state agency has rulemaking authority or not, or what its intentions were, if it is violating section 11347.5.[41] Government Code section 11347.5 states: "No state agency shall issue, . . . enforce or attempt to enforce any . . . standard of general application . . . which is a regulation as defined [in the APA] . . . unless the . . . standard of general application . . . has been adopted as a regulation and filed with the Secretary of State pursuant to [the APA]." (Emphasis added.)

Also, Government Code section 11342, subdivision (b), defines "regulation" as "every rule, regulation, . . . or standard of general application . . . by any state agency to implement, interpret, or make specific the law enforced or administered by it, . . ." (Emphasis added.) Clearly, the Board is responsible for administering Penal Code sections 2933 and 2934, and Title 15, CCR, sections 3043 and 3043.1, when considering a prisoner for parole.

Therefore, this claim by the Board is untenable and the Directive is an underground regulation.

In its second argument, the Board contends that it was only "comply[ing] with its lawyer's advice" (emphasis added) in rescheduling life parole consideration hearings--determining new dates excluding work incentive credits--and "rescinding any Board action finding parole suitability at hearings previously scheduled prematurely under the Attorney General's opinion."[42,43]

The Board may not, however, under controlling case law, rely on the fact that it was only "complying" with its lawyer's advice to excuse it from APA requirements. In Goleta Valley Community Hospital v. State Department of Health Services[44], the appellate court held that an agency's issuance of a letter written by its staff counsel "interpreting" a regulation was itself a "regulation," which was required to comply with the APA before it could be adopted.[45] The court also ruled that "a written interpretation of a rule or regulation which concerns a matter of import generally to those dealing with the interpreting agency cannot escape scrutiny on the ground it does no more than govern the agency's internal affairs. [Citation omitted, emphasis added.]" Also, in a prior determination[46] we found:

> "The source of the informal rule is not the determining factor in deciding whether the rule is a 'regulation.' If a rule, regulation, order, or

> standard of general application is adopted by the state agency to implement, interpret, or make specific the law enforced or administered by it, then it is a 'regulation' as defined by the APA." [Citation omitted.][47] [Emphasis added.]

Also, the Board's interpretation of the Attorney General's opinion as being mandatory is untenable. Opinions by the Attorney General, though respected and useful, are nonetheless merely "advisory."[48] The fact that such "opinions are not primary authority since they are of an advisory nature only [and that] [t]hey may be persuasive authority [citation omitted]" was also pointed out by the Commenter in this determination proceeding. The Board did not dispute this contention in its Response. In reviewing the law in this area, we conclude that the Commenter is correct.

It is also significant that even though the Model State APA exempts Attorney General opinions from rulemaking requirements,[49] the California APA does not. The California Legislature elected to exempt legal rulings of counsel issued by the Franchise Tax Board or the State Board of Equalization from the definition of "regulation."[50] The Legislature declined to exempt opinions of the Attorney General, however, even after the Attorney General specifically requested it.[51]

We therefore conclude that the fact that the Board was only "complying" with an opinion from the Attorney General does not allow the Board's Directive to escape the scrutiny of the APA.[52]

Third, the Board argues that it is bound by superior court decisions in two counties, in which one of the courts found the Attorney General's opinion persuasive in denying worktime credit to the complaining prisoners.

As stated in the California Constitution, article III, section 3.5 (see note 51):

> "An administrative agency . . . has no power to . . . refuse to enforce a statute, on the basis of it being unconstitutional unless an appellate court has made a determination that such statute is unconstitutional; . . ." [Emphasis added.]

A decision by a superior court does not have the same authority or precedential value as a decision by an appellate court. Even a decision of one department of a particular superior court is not binding as precedent on the other departments.[53] A superior court decision is binding only on the parties to that particular case

unless it is a class action or the decision involves issuance of an injunction. So, while it may be true that the Board is bound to follow the two superior court orders regarding the specific complaining prisoners, the superior courts are not appellate courts and did not issue orders of statewide general application.[54]

WE THEREFORE CONCLUDE THAT ADMINISTRATIVE DIRECTIVE NO. 87/4 IS A "REGULATION" AS DEFINED BY GOVERNMENT CODE SECTION 11342, SUBDIVISION (b).

SECOND, WE INQUIRE WHETHER THE CHALLENGED RULE FALLS WITHIN ANY LEGALLY ESTABLISHED EXCEPTION TO APA REQUIREMENTS.

Rules concerning certain activities of state agencies--for instance, "internal management"--are not subject to the procedural requirements of the APA.[55] None of the recognized exceptions (set out in footnote 55), however, apply to Administrative Directive No. 87/4.

WE CONCLUDE THAT NONE OF THE RECOGNIZED EXCEPTIONS APPLY TO ADMINISTRATIVE DIRECTIVE NO. 87/4.

III. CONCLUSION

For the reasons set forth above, OAL finds that the Board's Administrative Directive No. 87/4, which interprets statutory worktime provisions as not being applicable to prisoners who are serving 15 years or 25 years to life, or life with possibility of parole, is (1) subject to the requirements of the APA, (2) is a "regulation" as defined in the APA, and (3) is therefore invalid and unenforceable unless adopted as a regulation and filed with the Secretary of State in accordance with the APA.

DATE: February 16, 1988

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1 This Request was filed by Robert R. Smith, C37365, Building 11-221-L, P.O. Box 4000, Vacaville, CA 95696-4000. The Board of Prison Terms was represented by Ron E. Koenig, Chairman, and James A. Browning, Jr., Staff Attorney, 545 Downtown Plaza, Suite 200, Sacramento, CA 95814, (916) 322-6729.

2 The legal background of the regulatory determination process --including a survey of governing case law--is discussed at length in note 2 to 1986 OAL Determination No. 1 (Board of Chiropractic Examiners, April 9, 1986, Docket No. 85-001), California Administrative Notice Register 86, No. 16-Z, April 18, 1986, pp. B-14--B-16; typewritten version, notes pp. 1-4. See also Wheeler v. State Board of Forestry (1983) 144 Cal.App.3d 522, 192 Cal.Rptr. 693 (overturning Board's decision to revoke license for "gross incompetence in . . . practice" due to lack of regulation articulating standard by which to measure licensee's competence); City of Santa Barbara v California Coastal Zone Conservation Commission (1977) 75 Cal.App.3d 572, 580, 142 Cal.Rptr. 356, 361 (rejecting Commission's attempt to enforce as law a rule specifying where permit appeals must be filed--a rule appearing solely on a form not made part of the CCR). For an additional example of a case holding a "rule" invalid because (in part) it was not adopted pursuant to the APA, see National Elevator Services, Inc. v. Department of Industrial Relations (1982) 136 Cal.App.3d 131, 186 Cal.Rptr. 165 (internal legal memorandum informally adopting narrow interpretation of statute enforced by DIR). Also, in Association for Retarded Citizens--California v. Department of Developmental Services (1985) 38 Cal.3d 384, 396 n. 5, 211 Cal.Rptr. 758, 764 n. 5, the court avoided the issue of whether a DDS directive was an underground regulation, deciding instead that the directive presented "authority" and "consistency" problems. In Johnston v. Department of Personnel Administration (1987) 191 Cal.App.3d 1218, 1225, 236 Cal.Rptr. 853, 857, the court found that the Department of Personnel Administration's "administrative interpretation" regarding the protest procedure for transfer of civil service employees was not promulgated in substantial compliance with the APA and therefore was not entitled to the usual deference accorded to formal agency interpretation of a statute.

3 Title 1, CCR, section 121(a) provides:

> "'Determination' means a finding by [OAL] as to whether a state agency rule is a regulation, as defined in Government Code section 11342(b), which is invalid and unenforceable unless it has been adopted as a regulation and filed with the Secretary of State in accordance with the [APA] or unless it has been exempted by statute from

the requirements of the Act." [Emphasis added.]

4 As we have indicated elsewhere, an OAL determination concerning a challenged "informal rule" is entitled to great weight in both judicial and adjudicatory administrative proceedings. See 1986 OAL Determination No. 3 (Board of Equalization, May 28, 1986, Docket No. 85-004), California Administrative Notice Register 86, No. 24-Z, June 13, 1986, p. B-22; typewritten version, pp. 7-8; Culligan Water Conditioning of Bellflower, Inc. v. State Board of Equalization (1976) 17 Cal.3d 86, 94, 130 Cal.Rptr. 321, 324-325. The Legislature's special concern that OAL determinations be given appropriate weight in other proceedings is evidenced by the directive contained in Government Code section 11347.5, subdivision (c): "The office shall . . . [m]ake its determination available to . . . the courts." (Emphasis added.)

5 A comment was received from Donald W. Crisp, C-87517, Building 11-120-L, P. O. Box 4000, Vacaville, CA 95696-4000, concerning this Request; the Department submitted a Response to this Request. Both were considered in making this Determination.

In general, in order to obtain full presentation of contrasting viewpoints, we encourage affected agencies to submit responses. If the affected agency concludes that part or all of the challenged rule is in fact an underground regulation, it would be helpful, if circumstances permit, for the agency to concede that point and to permit OAL to devote its resources to analysis of truly contested issues.

6 An OAL finding that a challenged rule is illegal unless adopted "as a regulation" does not of course exclude the possibility that the rule could be validated by subsequent incorporation in a statute.

7 Pursuant to Title 1, CCR, section 127, this Determination shall become effective on the 30th day after filing with the Secretary of State.

8 We refer to the portion of the APA which concerns rulemaking by state agencies: Chapter 3.5 of Part 1 ("Office of Administrative Law") of Division 3 of Title 2 of the Government Code, sections 11340 through 11356.

9 Stats. 1976, ch. 1139.

10 Stats. 1979, ch. 255.

11 Penal Code sections 5076.1 and 5077.

12 We discuss the affected agency's rulemaking authority (see Gov. Code, section 11349, subd. (b)) in the context of reviewing a Request for Determination for the purposes of exploring the context of the dispute and of attempting to ascertain whether or not the agency's rulemaking statute expressly requires APA compliance. If the affected agency should later elect to submit for OAL review a regulation proposed for inclusion in the California Code of Regulations, OAL will, pursuant to Government Code section 11349.1, subdivision (a), review the proposed regulation in light of the APA's procedural and substantive requirements.

The APA requires all proposed regulations to meet the six substantive standards of necessity, authority, clarity, consistency, reference, and nonduplication. OAL does not review alleged "underground regulations" to determine whether or not they meet the six substantive standards applicable to regulations proposed for formal adoption.

The question of whether the challenged rule would pass muster under the six substantive standards need not be decided until such a regulatory filing is submitted to us under Government Code section 11349.1, subdivision (a). At that time, the filing will be carefully reviewed to ensure that it fully complies with all applicable legal requirements.

Comments from the public are very helpful to us in our review of proposed regulations. We encourage any person who detects any sort of legal deficiency in a proposed regulation to file comments with the rulemaking agency during the 45-day public comment period. Such comments may lead the rulemaking agency to modify the proposed regulation.

If review of a duly-filed public comment leads us to conclude that a regulation submitted to OAL does not in fact satisfy an APA requirement, OAL will disapprove the regulation. (Gov. Code, sec. 11349.1.)

13 Government Code section 11342, subdivision (a). See Government Code sections 11343; 11346. See also 27 Ops.Cal.Atty.Gen. 56, 59 (1956).

14 See Poschman v. Dumke (1973) 31 Cal.App.3d 932, 943, 107

Cal.Rptr. 596, 609.

15 Penal Code section 1170.

16 For a general discussion and history of determinate sentencing and indeterminate sentencing see In re Monigold, (1983) 139 Cal.App.3d 485, 188 Cal.Rptr. 698.

17 There are two other possible sentences that may be imposed for first degree murder -- (1) death and (2) confinement in a state prison for life without possibility of parole. (Penal Code section 190.)

18 A proposed revision of section 190 by the Legislature (Senate Bill No. 402, Stat. 1987, c. 1006, sec. 1, p. 166; approved by the Governor on September 22, 1987, and filed with the Secretary of State on September 23, 1987) will appear on the primary ballot in June 1988 for the voters to consider. This proposed revision of section 190 appears below with proposed changes underlined.

"Section 190. Murder; degrees; punishment; parole

(a) Every person guilty of murder in the first degree shall suffer death, confinement in state prison for life without possibility of parole, or confinement in the state prison for a term of 25 years to life. The penalty to be applied shall be determined as provided in Sections 190.1, 190.2, 190.3, 190.4, and 190.5.

Except as provided in subdivision (b), every person guilty of murder in the second degree shall suffer confinement in the state prison for a term of 15 years to life.

The provisions of Article 2.5 (commencing with Section 2930) of Chapter 7 of Title 1 of Part 3 of the Penal Code shall apply to reduce any minimum term of 25 or 15 years in a state prison imposed pursuant to this section, but such person shall not otherwise be released on parole prior to such time.

(b) Every person guilty of murder in the second degree shall suffer confinement in the state prison for a term of 25 years to life if the victim was a peace officer, as defined in subdivision (a) of Section 830.1, subdivision (a) or (b) of Section 830.2, or Section 830.5, who was killed while engaged in the performance of his or her duties, and the defendant knew or

reasonably should have known that the victim was such a peace officer engaged in the performance of his or her duties.

The provisions of Article 2.5 (commencing with Section 2930) of Chapter 7 of Title 1 of Part 3 of the Penal Code shall not apply to reduce any minimum term of 25 years in state prison when the person is guilty of murder in the second degree and the victim was a peace officer, as defined in this subdivision, and such person shall not be released prior to serving 25 years confinement."

19 Analysis by Legislative Analyst for Proposition 7, "Murder. Penalty -- Initiative Statute," November 7, 1978.

20 Section 2931, subdivision (a) provides in part:

"In any case in which a prisoner was sentenced to the state prison pursuant to Section 1170, or if he committed a felony before July 1, 1977, and he would have been sentenced under Section 1170 if the felony had been committed after July 1, 1977, the Department of Corrections shall have the authority to reduce the term prescribed under such section by one-third for good behavior and participation consistent with subdivision (d) of Section 1170.2."

21 Title 15, CCR, section 3043.1, subdivision (a) provides:

"Any inmate described in section 3043(a) [,i.e., inmate serving an indeterminate term of 15 years to life or 25 years to life for a crime committed before January 1, 1983] may waive the right to receive behavior and participation credit and thereafter be eligible to earn worktime credits in the amounts provided for in section 3043(c)."

Title 15, CCR, section 3043.1, subdivision (c) provides that "Accepted waivers shall be irrevocable." (Emphasis added.)

On the face of the waiver it also specifically states that the waiver is irrevocable. See Request for Determination, Attachment 6 (unnumbered).

22 Request for Determination, Attachment 6 (unnumbered).

23 As of January 1, 1988, the California Administrative Code

("CAC") became known as the California Code of Regulations ("CCR").

24 Sections 3043 and 3043.1 went into effect December 17, 1982, as emergency regulations. (See Government Code section 11346.1.) A certificate of compliance was subsequently filed with OAL as part of the rulemaking process, completing the formal adoption of sections 3043 and 3043.1. Sections 3043 and 3043.1 were then filed with the Secretary of State and became effective on a permanent basis on April 16, 1983. In August 1987, another emergency file was submitted to OAL, indicating, inter alia, nonsubstantive changes to sections 3043 and 3043.1. This emergency file was approved and went into effect August 7, 1987, through December 6, 1987. A certificate of compliance was subsequently filed, but the file was disapproved on January 4, 1988, for reasons not affecting sections 3043 and 3043.1. The next day the Department filed another emergency rulemaking file, however, with the same nonsubstantive changes in section 3043 and 3043.1, which was approved and filed with the Secretary of State, effective January 5, 1988.

25 On March 26, 1987, the Attorney General of the State of California published opinion No. 86-1102 (70 Ops.Cal.Atty. Gen. 49 (1987)). In this opinion, the Attorney General concluded:

> "State prisoners serving sentences of 25 years to life, 15 years to life, or life with possibility of parole are not eligible for worktime credits under Penal Code section 2933." [Emphasis added.]

26 See Board's Response, Exhibit 1, Board Memorandum, dated April 1, 1987, to the Attorney General. In this memorandum the Board stated:

> "To comply with the opinion [No. 86-1102] of your office, all life parole consideration hearings presently scheduled for life prisoners serving 25 years to life and 15 years to life terms have been cancelled and any decisions previously rendered in these hearings will be rescinded. . . . [Par.] [Board] records indicate that to date fifty-four parole consideration hearings have been conducted for life prisoners who were committed to state prison for murder offenses which occurred on or after November 7, 1978. Of the fifty-four hearings conducted, four of these life prisoners were granted future parole dates. None of these four life prisoners, however, have been released; and their previously granted parole dates will be rescinded."

27 In the Matter of the Application of Roger J. Monigold for Writ of Habeas Corpus (Superior Court San Luis Obispo County, September 1987, No. HC 2601(1)) and In the Matter of the Petition of Jeffrey Ian Cook for Writ of Habeas Corpus (Superior Court Solano County, October 1987, No. C22732). Ten other petitions for Writ of Habeas Corpus were consolidated with petition No. C22732. See Board's Response to the Request, Exhibits 4 and 5.

28 Board's Response, p. 3.

29 In addition to several substantive arguments, which are discussed in the text of the determination, the Board alleges that a copy of the Request "was not received by the Board [from the Requester] as required by Title 15 [sic] [CCR] section 122, subdivision (c)." (Emphasis added.) The Board claims that a log of all correspondence received by the Board is maintained by the executive secretary to the Chairman of the Board, and it revealed that no correspondence was received from Robert R. Smith, the Requester in this matter.

Title 1, CCR, section 122, subdivision (c), requires the Requester to:

> "transmit a copy of the request for determination . . . to the head of the state agency whose rule is the subject of the request. A copy of a signed and dated statement under penalty of perjury telling how and when the [requester] transmitted the document to the head of the state agency shall accompany the request for determination." [Emphasis added.]

As quoted above, section 122, subdivision (c), requires the Requester to only "transmit" a copy of the Request to the state agency head. Title 1, CCR, section 121, subdivision (d), defines "transmit" as follows:

> "'Transmit' means to physically deliver a letter, document or other written instrument to the addressee or to deposit the written instrument into the United States mail or other mail delivery service." (Emphasis added.)

Hence, it is not required that the document be "received." Section 122 also requires that a signed and dated statement under penalty of perjury accompany the Request. This declaratory statement was included with the Request when it was received by OAL.

After being informed by the Board, in August 1987, that it

apparently had not received a copy of this Request, as well as two other separate Requests, OAL sent copies of all three Requests to the Board. The Board does not seem to have been prejudiced by not receiving a copy of this Request until August 1987, in that it received the copy prior to the beginning of active consideration of the Request and was able to file a Response to the Request with OAL within the regulatory deadline.

We conclude therefore, that the Request was properly filed with OAL and satisfied all the requirements of Title 1, CCR, section 122.

30 See Faulkner v. California Toll Bridge Authority (1953) 40 Cal.2d 317, 324 (point 1); Winzler & Kelly v. Department of Industrial Relations (1981) 121 Cal.App.3d 120, 174 Cal.Rptr. 744 (points 1 and 2); cases cited in note 2 of 1986 OAL Determination No. 1. A complete reference to this earlier Determination may be found in note 2 to today's Determination.

31 Roth v. Department of Veteran Affairs (1980) 110 Cal.App. 3d 622, 167 Cal.Rptr. 552.

32 Stoneham v. Rushen (1982) 137 Cal.App.3d 729, 188 Cal.Rptr. 130; Faunce v. Denton (1985) 167 Cal.App.3d 191, 213 Cal. Rptr. 122.

33 Administrative Directive No. 87/4; Board memorandum, dated April 1, 1987, to the Attorney General.

34 Board's Response, Exhibit 1, Board's Memorandum, dated April 1, 1987, to the Attorney General.

35 Board's Response, p. 3.

36 (1980) 110 Cal.App.3d 622, 167 Cal.Rptr. 552.

37 Board's Response, Exhibit 1, Board's Memorandum, dated April 1, 1987, to the Attorney General. In this memorandum, the Board stated that their "records indicate that to date fifty-four parole consideration hearings have been conducted for life prisoners who were committed to state prison for murder offenses which occurred on or after November 7, 1978. Of the fifty-four hearings conducted, four of these life prisoners

were granted future parole dates. None of these four life prisoners, however, have been released; and their previously granted parole dates will be rescinded."

38 For purposes of discussion we will focus on Penal Code section 2933. However, we conclude that the Directive meets the definition of "regulation," as defined in the APA, in that it also interprets Penal Code section 2934.

As stated previously, section 2934 provides for prisoners entitled to "good behavior and participation" credits under section 2931 to waive their rights under section 2931 and instead receive worktime credits under section 2933. In light of the Directive's ruling, the Board has apparently refused to recognize the irrevocable waiver signed by the Requester, as well as waivers signed by other indeterminate prisoners, under section 2934, and instead, determined that these prisoners were also not eligible for worktime credits.

39 See Board's Response, p. 2.

40 Government Code section 11349, subdivision (e), defines "Reference" as "the statute, court decision, or other provision of law which the agency implements, interprets, or makes specific by adopting, amending, or repealing a regulation."

41 See 1987 OAL Determination No. 4 (State Labor Commissioner, March 25, 1987, Docket No. 86-010), California Administrative Notice Register 87, No. 15-Z, April 10, 1987, pp. B-27--B-42 (OAL found it unnecessary to resolve the issue of "authority" in the regulatory determinations context); see also, note 12, supra.

42 Board's Response, p. 1.

43 This contention is evidenced by language in the Directive where the Board states "To comply with this opinion [No. 86-1102], the [Board] will cancel all initial life parole consideration hearings previously scheduled for prisoners who are serving 25 years to life and 15 years to life sentences and will rescind decisions rendered in hearings conducted prior to issuance of the Attorney General's opinion." (Emphasis added.)

44 (1983) 149 Cal.App.3d 1124, 197 Cal.Rptr. 294. See also National Elevator Services, Inc. v. Department of Industrial Relations (1982) 136 Cal.App.3d 131, 186 Cal.Rptr. 165 (internal legal memorandum informally adopting narrow interpretation of statute enforced by DIR).

45 Id., p. 1129.

46 1987 OAL Determination No. 10 (Department of Health Services, August 6, 1987, Docket No. 86-016), summary published in California Administrative Notice Register 87, No. 34-Z, August 21, 1987, p. 33.

47 Id., typewritten version, p. 17.

48 People v. Vallerga (1977) 67 Cal.App.3d 847, 136 Cal.Rptr. 429 (opinions of Attorney General are advisory only and do not carry weight of law); Unger v. Superior Court of Marin County (1980) 102 Cal.App.3d 681, 162 Cal.Rptr. 611 (although opinions of Attorney General are entitled to great weight, such opinions are not controlling as to meaning of a constitutional provision or statute); California Public Utilities Commission v. California Energy Resources Conservation and Development Commission (1984) 150 Cal.App.3d 437, 197 Cal.Rptr. 866 (while an apposite Attorney General's opinion is accorded deference by the courts, it is by no means binding).

49 Model State APA section 3-116(9), 14 West's U.Laws Ann. (1987 pocket pt.) 70, 107, (1981); See Bonfield, State Administrative Rule Making (1986) Appendix I, at p. 615; discussion of MSAPA section 3-116(9), id., at pp. 419-420.

50 See Government Code section 11342, subdivision (b).

51 Letter from Allen H. Sumner, Senior Assistant Attorney General on behalf of John K. Van De Kamp, California Attorney General, dated July 19, 1983, to Assemblyman Bruce Young, author of Assembly Bill 227 (Stats. 1983, c. 1080, sec. 1), which added the exemption of legal rulings of counsel issued by the Franchise Tax Board or State Board of Equalization to the definition of "regulation." See Government Code section 11342, subdivision (b).

52 Legal Basis of the Board's Decision to Not Enforce the

Worktime Credit Statutes

The Board implicitly argues that the challenged rule is not an underground regulation because it reflects the only legally viable interpretation of the controlling statutes. Indeed, we have previously concluded that simply repeating principles drawn directly from controlling provisions of law does not constitute the exercise of quasi-legislative power and does not violate Government Code section 11347.5, subdivision (a).

The difficulty here is that we cannot accept the Board's rationale for concluding that its reading of the controlling statutes is the only legally viable interpretation. As will be discussed below, the Board's rationale cannot be reconciled with California Constitution article III, section 3.5, which (inter alia) prohibits administrative agencies from declining to enforce statutes on grounds of unconstitutionality.

The rational relied upon by the Board is as follows: interpreting Penal Code section 2933, it is concluded that state prisoners serving sentences of 25 years or 15 years to life, or life with possibility of parole are not eligible for worktime credits under section 2933. The reasons given for reaching this conclusion are the following:

1. On its face, section 2933 specifically applies only to prisoners sentenced to a state prison under section 1170 and only they are entitled to worktime credits. As discussed supra, under "Background," prisoners whose sentences are 15 years or 25 years to life pursuant to section 190 are considered sentenced generally under section 1168, subdivision (b) (indeterminate sentencing), and hence, are not entitled to worktime credits under section 2933 unless some other statute provides otherwise.

2. The Board concludes that no other statute allows for worktime credits for those prisoners serving 15 years or 25 years to life, or life with possibility of parole. The Board notes that arguably Penal Code section 190 may be such a statute. However, the Board concludes that

> (1) section 190 is an initiative measure that did not specifically provide for changes by the Legislature without the approval of the electorate (see Cal. Const., art. II, sec. 10, which prohibits the Legislature from amending or repealing an initiative statute by another ordinary statute unless the initiative statute permits amendment or repeal without voters approval), and

(2) section 190's reference to Article 2.5 was "specific" and not "general," and there was no evidence contrary to the Board's finding that the voters intended that only sections 2930, 2931, and 2932, which were part of Article 2.5 at the time the initiative became effective, would allow for a one-third reduction in a prisoner's term that was sentenced pursuant to section 190. Hence, sections 2933 and 2934 cannot be utilized by prisoners sentenced under section 190 to receive one-half worktime credits.

[N.B.: The proposed revision of section 190 (see note 18, supra) would tend to indicate that the Board may be incorrect in concluding that the voters intended to, in their reference to Article 2.5, include only sections 2930, 2931, and 2932, and not any subsequent changes or additions to Article 2.5. The Legislative Counsel's Digest for this proposed revision of section 190 states: "Under existing law enacted by initiative, the penalty for second degree murder is imprisonment in the state prison for 15 years to life. Worktime or good behavior credits apply to reduce a minimum term of 15 years, . . ." (Emphasis added.) Additionally, in proposed subdivision (b), the new proposed language makes a second reference to "The provisions of Article 2.5" (emphasis added) with the clear intent that all current provisions of Article 2.5 be applicable to prisoners sentenced to section 190. It would not be logical to assume that the voters, if the revision is approved, would intend that the two references to Article 2.5 have two different meanings.]

In other words, the Board declared section 2933, and section 2934 (by applying the same reasoning), unenforceable as to prisoners serving 15 years or 25 years to life, and life with possibility of parole. Sections 2933 and 2934 could not be so applied because this would contradict or amend section 190, which is forbidden by the California Constitution. The Board thus declares sections 2933 and 2934 unconstitutional as applied to the three above noted categories of prisoners.

The Board did not, however, address article III, section 3.5 of the California Constitution which states:

"An administrative agency, including an administrative agency created by the Constitution . . . has no power:

(a) To declare a statute unenforceable, or to refuse to enforce a statute, on the basis of it being unconstitutional unless an appellate court

has made a determination that such statute is unconstitutional;

(b) To declare a statute unconstitutional;

(c) . . . ." [Emphasis added.]

Assuming, without deciding, that the above-noted analysis of the relationship between Penal Code section 190 and the worktime credit provisions is correct, the Board nevertheless cannot refuse to enforce a statute on the basis that it believes that it is unconstitutional. In Reese v. Kizer (1987) __ Cal.App.3d __, 240 Cal.Rptr. 151, the appellate court agreed with the Department of Health Services' argument that "pursuant to article III, section 3.5, they were without power to make a determination that the Legislature had enacted a law in violation of constitutional mandate." (Id., p. 156.) The Reese court further stated:

> "Article I section 26 of our state Constitution provides: 'The provisions of this Constitution are mandatory and prohibitory, unless by express words they are declared to be otherwise.' The Supreme Court has observed that 'This rule of construction applies to all provisions of the Constitution and to all branches of the state government, . . .' (Mosk v. Superior Court (1979) 25 Cal.3d 474, 493, fn. 17, 159 Cal.Rptr. 494, []; State Board of Education v. Levit (1959) 52 Cal.2d 441, 460-461, 343 P.2d 8.) Consequently, our state Legislature may not direct an administrative agency to violate the constitutional mandate of article III, section 3.5 of the Constitution."

The Reese court also pointed out what an agency can do if it concludes that a bill before the Legislature is unconstitutional:

> "As one state senator stated in his ballot argument favoring the constitutional amendment [article III, section 3.5], 'Every statute is enacted only after a long and exhaustive process, involving as many as four open legislative committee hearings, where members of the public can express their views. If the agencies question the constitutionality of a measure, they can present testimony at the public hearings during legislative consideration. Committee action is followed by full consideration by both houses of the Legislature.' (Ballot Pamp. [Proposed Amends. to Cal. Consti. with analysis of Proposition 5 by Legislative Analyst and arguments to voters, Primary Elec. (June 6, 1978)], at p. 26.)" [Emphasis added.]

What can an agency do after a bill is approved by the

Legislature and signed into law by the Governor? Alternatives open to a state agency that concludes that a statute is unconstitutional include (1) seeking an amendment through the legislative process and (2) filing an action for declaratory relief with the objective of obtaining an authoritative appellate decision.

53 See Los Angeles v. Oliver (1929) 102 Cal.App. 299; see generally California Rules of Court, rule 977 (opinion that is not ordered published shall not be cited or relied on by a court or a party in any other action or proceeding except as provided in subdivision (b)).

54 It is also significant that these superior court cases appeared to involve litigants without legal representation. The courts' cursory opinions suggest that the merits of the issues may not have been fully and fairly presented. As in the context of class action litigation, it would appear inappropriate to conclude that all members of the three groups of life prisoners should be bound by such court orders.

55 The following provisions of law may also permit agencies to avoid the APA's requirements under some circumstances, but do not apply to the case at hand:

a. Rules relating only to the internal management of the state agency. (Gov. Code, sec. 11342, subd. (b).)

b. Forms prescribed by a state agency or any instructions relating to the use of the form, except where a regulation is required to implement the law under which the form is issued. (Gov. Code, sec. 11342, subd. (b).)

c. Rules that "[establish] or [fix] rates, prices or tariffs." (Gov. Code, sec. 11343, subd. (a)(1).)

d. Rules directed to a specifically named person or group of persons and which do not apply generally or throughout the state. (Gov. Code, sec. 11343, subd. (a)(3).)

e. Legal rulings of counsel issued by the Franchise Tax Board or the State Board of Equalization. (Gov. Code, sec. 11342, subd. (b).)

f. Contractual provisions previously agreed to by the complaining party. City of San Joaquin v. State

Board of Equalization (1970) 9 Cal.App.3d 365, 376, 88 Cal.Rptr. 12, 20 (sales tax allocation method was part of a contract which plaintiff had signed without protest); see Roth v. Department of Veterans Affairs (1980) 110 Cal.App.3d 622, 167 Cal.Rptr. 552 (dictum); Nadler v. California Veterans Board (1984) 152 Cal.App.3d 707, 719, 199 Cal.Rptr. 546, 553 (same); but see Government Code section 11346 (no provision for non-statutory exceptions to APA requirements); see International Association of Fire Fighters v. City of San Leandro (1986) 181 Cal.App.3d 179, 182, 226 Cal.Rptr. 238, 240 (contracting party not estopped from challenging legality of "void and unenforceable" contract provision to which party had previously agreed); see Perdue v. Crocker National Bank (1985) 38 Cal.3d 913, 926, 216 Cal.Rptr. 345, 353 ("contract of adhesion" will be denied enforcement if deemed unduly oppressive or unconscionable).

The above is not intended as an exhaustive list of possible APA exceptions. Further information concerning APA exceptions is contained in a number of previously issued OAL determinations. The Index of OAL Regulatory Determinations (available from OAL, (916) 323-6225) is a helpful guide for locating such information.